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No. 01-1269

In The

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, et al.,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

-On a Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Respondents. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 208,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development. Protecting our members' fundamental constitutional rights has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a host of critical land regulation cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*,

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002); and *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 71 U.S.L.W. 3153 (U.S. Aug. 26, 2002) (No. 01-1243).

INTRODUCTION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. This Court has developed an interpretation of the clause that protects one's basic substantive rights, in addition to the right to process. "Substantive due process" guarantees that a state cannot take away a person's life, liberty or property without appropriate governmental justification, regardless of the government's procedures. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (explaining that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . ."); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (explaining that it is possible for a state to deprive property rights by unreasonable legislation); *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897) (recognizing that "liberty" means more than a person's right to be free from incarceration, but also to be free to "live and work where he will" and enter into proper contracts).

In analyzing Buckeye's due process claim, the court below correctly began its analysis by confirming that Buckeye had a Constitutionally protectable property interest. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 641 (6th Cir. 2001); *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1986) (explaining that the first step is to identify the property or liberty interest entitled to due process protections). NAHB agrees with the Sixth Circuit's conclusions that Buckeye had a property interest and that Buckeye "presented sufficient evidence to create a genuine issue of material

fact as to whether the" City violated Buckeye's due process rights. *Buckeye*, 263 F.3d at 644.

However, NAHB disagrees with the analysis that the Sixth Circuit used to determine that Buckeye possessed a property interest. In its analysis, the court below focused on the facts that the City Council had approved Buckeye's site plan and that a tangible benefit of an approved plan is a building permit. *Buckeye*, 263 F.3d at 642. According to the court, Buckeye had a property interest in the building permit. This analysis, however, was not necessary. Buckeye's property right comes from its ownership of the land and its right to use it, not from a property right in a permit.

ARGUMENT

I. The Right to Use One's Property Is a Right That the Constitution Protects.

When a claimant argues that the government has substantively deprived him of his property without due process of law, the claimant must initially prove that he has a property right that the Constitution protects. *Brock, 481* U.S. at 260. Here, the right at issue is the right to own and use property—which the Constitution protects from irrational and arbitrary government action.

A. The Right to Own Property Inheres With Every Citizen.

i. The Right to Own Property Is Fundamental to Our Form of Government.

The Colonial leaders of the United States believed that "the protection of private property was crucial to the preservation of freedom," and that "property rights antedated political liberty." James W. Ely, Jr., *The Guardian of Every Other Right, A Constitutional History of Property Rights* 28 (Oxford University Press 2d ed. 1998); *See generally* Bernard H. Siegan, *Property Rights* 50-52 (Transaction Publishers 2001); *Holden v. Hardy*, 169 U.S. 366, 389 (1897) (providing that there are certain "fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State."). It was also understood that the function of government was to secure property rights. Ely, *supra*, at 32. It therefore follows that if society establishes government to protect property rights, then those rights

must be held by the people prior to the formation of government. Hence, the right to hold property is not created by governments, but in the United States, it inheres in all Americans.

In pre-Constitutional America, most states followed the English common law as the basis for their jurisprudence and "the views of William Blackstone influenced American law long after the break with England." Ely, *supra*, at 32; *See Alden v. Maine*, 527 U.S. 706, 715 (1999) (explaining that Blackstone's "works constituted the preeminent authority on English law for the founding generation."). Blackstone wrote that individuals have certain "absolute" rights, which are rights that belong to individuals "merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." J.W. Ehrlich, *Ehrlich's Blackstone* 42 (Greenwood Press 1959). "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at 51.

The early courts of the United States also understood that the right to own property existed before the formation of government. This is evidenced by their references to "fundamental" and "natural" rights. For example, the Supreme Court of Ohio explained:

> The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself . . .. The right of private property being, therefore, an *original right*, which it was one of the primary and most

> sacred objects of government to secure and protect . . .. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, and prohibiting the enactment of any law impairing the obligations of contracts, were evidently designed to protect the right of private property as one of the primary and original objects of civil society . . ..

Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 632 (Ohio 1853) (emphasis in original). Similarly, this Court has provided "it has now become the fundamental law of this country that life, liberty, and property (which include "the pursuit of happiness") are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation." *Bartmeyer v. Iowa*, 85 U.S. 129, 136 (1873); *See also Ogden v. Saunders*, 25 U.S. 213, 319 (1827) (Johnson, J., dissenting) ("Admitting it, then, to be true, that, in general, men derive the right of private property, and of contracting engagements, from the principles of natural, universal law; admitting that these rights are, in the general, not derived from, or created by society, but are brought into it; and that no express, declaratory, municipal law, be necessary for their creation or recognition; yet, it is equally true, that these rights, and the obligations resulting from them, are subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive enactions of municipal law."); *Henry v. Dubuque & Pac. R.R. Co.*, 10 Iowa 540, 543-44 (Iowa 1860) ("The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand . . .. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written

constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy.").

No one would suggest that a state could constitutionally pass a statute that made it unlawful for citizens to own private property. *See Holden*, 169 U.S. at 391 (1897) (explaining, in an analysis of the due process clause, that a state prohibition against acquiring property would be unlawful and that it would be illegal to "deprive any class of persons of the general power to acquire property . . ."). This is because the right to own property is not a right that government grants. In the United States, it is a fundamental right that existed prior to the formation of the either the state or federal governments.

ii. This Court Has Recognized That Owning Property Is Privilege.

This Court has also acknowledged that the government does not grant the right to own property but that the right inheres in all citizens pursuant to Article IV of the Constitution. U.S. Const. art. IV, §2. The Court has often cited *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *See e.g. Blake v. McClung*, 172 U.S. 239 (1898); *United States v. Wheeler*, 254 U.S. 281 (1920); *Supreme Court of New Hamshire v. Piper*, 470 U.S. 274 (1985). In *Corfield*, Justice Washington, in interpreting Article IV of the Constitution, explained that certain "privileges and immunities" are "fundamental," "belong . . . to the citizens of all free governments," and "have at all times been enjoyed by the citizens of the several states which compose [the] Union from the time of their becoming free, independent and sovereign." Among

these are "the right to acquire and possess property of every kind" and "to take, hold and dispose of [real and personal] property." *Corfield*, 6 F. Cas. at 551; *See Saenz v. Roe*, 526 U.S. 489, 501 n14 (1999) (quoting *Corfield* to advance the proposition that the right travel is a fundamental right guaranteed by the privileges and immunities clause.)

Similarly, in *Ward v. Maryland*, 79 U.S. 418 (1870), the state of Maryland found Mr. Ward in violation of a state law that made it unlawful to sell goods in Maryland without first obtaining a license. Mr. Ward claimed that the law violated the privileges and immunities clause of the Constitution. *Id.* at 425. This Court explained that it would not attempt to define the words "privileges and immunities," but that the terms unmistakably protect the right of a citizen of a state to "acquire personal property" and to "take and hold real estate." *Id.* at 430.[2]

Therefore, this Court has clarified that one of the privileges of being a citizen of a state is the right to

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[2] Likewise, in *Oyama v. California*, 332 U.S. 633 (1948), this Court addressed a challenge to California's Alien Land Law as applied to a minor citizen whose guardian was a Japanese alien. The case presented a conflict "between the State's right to formulate a policy of landholding . . . and the right of American citizens to own land anywhere in the United States." In addressing the conflict, the Court interpreted 42 U.S.C §1982, which provides that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." It concluded that 42 U.S.C §1982 is a federal statute giving "**all** citizens the right take and hold real property" and that the Fourteenth Amendment vindicated this right. *Id.* at 640 (emphasis added). Finally, the court held that the right to hold property right may not be subordinated due to a citizen's father's country of origin. *Id.* at 647.

acquire, take, hold, possess, or in other words own, real and personal property.

In the case at bar, Buckeye had the fundamental right to own property and it exercised this right when it purchased the real property in question. *Buckeye*, 263 F.3d at 630.

B. The Right to Use Property is Inherent in Ownership.

As explained above, the Constitution protects one's right to own property. Moreover, intrinsic in ownership, is the right to use the property. In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) the Federal Government seized Mr. Good's home because it had been used in furtherance of a drug felony in violation of federal law.[3] The Government seized the property without prior notice to Mr. Good and without an adversarial hearing. *Id.* at 47. Mr. Good claimed that the Government deprived him of his property without due process in violation of the Fifth Amendment.[4] The Court noted that there could be no dispute that the seizure "deprived him of property interests protected by the Due Process Clause." Furthermore, the Court explained that Mr. Good had valuable rights of ownership and that these rights include "the right of sale, the right of occupancy, **the right to unrestricted use** and enjoyment, and the right to receive rents." *Id.* at 54 (emphasis added).

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[3] Mr. Good was incarcerated at the time of seizure.

[4] Mr. Good made his claim under the Fifth Amendment as opposed to the Fourteenth Amendment because he challenged the actions of the federal government, not a state government.

Furthermore, in *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), a Fifth Amendment "takings" case, this court explained:

> It is conceivable that the [term property] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

Thus, in the United States, property is not merely an object over which the owner may legally assert dominion. It is a group of rights that are inherent in the owner's relationship with the physical thing and one of those is the right to use the property. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it."); *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) ("property rights in the land include the right to **use**, lease and dispose of it for lawful purposes . . . and the Constitution protects these *essential* attributes of property . . .") (emphasis added) (citations omitted); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983) ("A property right is not bare title, but the right of exclusive use and enjoyment."); *Appeal of Perrin*, 156 A. 305, 306 (Pa. 1931) ("The right of an owner to devote his property to any legitimate use is within the protection of the federal Constitution."); *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) ("Therefore a law which

forbids the use of certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership.").[5]

C. State Law Restricts Property Rights, It Does Not Create Them.

In the United States "sovereign powers are delegated to the agencies of government, sovereignty itself [, however,] remains with the people . . .. And the law is the definition and limitation of power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Thus, rights are not granted by government, they inhere in the people and the people have allowed the government to restrict those rights.

This concept was recognized in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) where a property owner wished to expand his beachfront home. In *Nollan*, however, the California Coastal Commission would not issue a building permit, unless Mr. Nollan would grant it an easement along his beachfront property. This Court found that the Commission had taken Mr. Nollan's property in violation of the Fifth Amendment.[6] In doing so, the Court explained that "the right to build on

[5] Courts that declare that state law create the right to use one's property fail to recognize that the right to use property is inherent in the ownership of property. Land use laws, such as zoning laws, restrict the use of property; they do not create the right to use property. If zoning created the right to use property, landowners in cities such as Houston, TX (where there is no zoning) would not have the right to use their property. This is counter-intuitive.

[6] Though the Court did not directly analyze the issue, it must have determined that Mr. Nollan had a property interest due to his ownership of his home.

one's property-even though its exercise can be subjected to legitimate permitting requirements-cannot remotely be described as a 'governmental benefit.'" *Id.* at 833 n.2. In other words, the right to use one's property is not a right that is granted by the state. *See also Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (explaining that "zoning regulations [interfere] with the general rights of the land owner by restricting the character of his use . . ..")

Therefore, as provided above, the right to own property is central to our form of government and inheres to every citizen. In addition, as this Court has explained, inherent in ownership, is the right to use one's property, though states may regulate and restrict the way in which a property owner uses his or her property. Thus, when courts analyze whether a substantive due process claimant has a property interest in real or personal property, the courts should focus on the claimant's relationship with the property, not on any state created restrictions to the owners use.

The court below correctly concluded that Buckeye possessed a property right that the Constitution protects. However, it incorrectly focused on whether Buckeye was entitled to a building permit because the City had approved its site plan. Buckeye had a right to use its property because it owned the property. The Sixth Circuit should have acknowledged that Buckeye's right to use its property is protected by the due process clause.

II. The "Entitlement Approach" Has Been Incorrectly Applied to Cases Where The Government Regulates Tangible Property.

Many courts, including the Sixth Circuit, have used the "entitlement approach" to determine whether a due process claimant has a protectable property right. This analysis, may be applicable to benefits granted by a state. However, it is not applicable when the claimant holds real or personal property because such a claimant has an inherent right to use its property.

A. The *Roth* and *Perry* "Entitlement Approach."

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), a state university dismissed a professor after one year of employment. The professor claimed that the university violated his due process rights by punishing him for asserting his right to free speech, and by not providing him with reasons for his dismissal and a hearing to respond. In determining whether the professor had a property interest in his employment that was protected by the Constitution this Court explained "to have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it." *Id.* at 577. Furthermore, the Court provided that the Constitution does not create property interests. "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings . . .." *Id.* at 577.

In a companion case, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), which was based on similar facts, the Court reiterated that one has a property interest in a benefit if

"there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . .."

Taken together, these cases have spawned the "entitlement approach" to determine whether a person has a property right protected by the Constitution and many Circuits have incorrectly used this approach in land regulation cases. Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash Univ. Journal of Law & Policy 61, 78, 97 (2000) ("The constitutional basis for [the entitlement] rule is problematic and courts should abolish it."); Kenneth B. Bley, Tina R. Axelrad, *In Search for Constitutionally Protected "Property" In Land-Use Law*, 29 Urb. Law. 251, 265-68 (1997). These Circuits "look to the landowners 'degree of entitlement' to whatever land use permit the owner is seeking . . .." Bley and Axelrad, *supra*, at 262.

The court below improperly used the "entitlement approach" in determining that Buckeye had a property interest in its approved site plan. It explained that "an abstract need or unilateral expectation does not suffice to create a property interest; rather, a person must 'have a legitimate claim of entitlement.'" *Buckeye*, 263 at 641 (citations omitted). Moreover, the City argued that since site plan approval was discretionary, Buckeye did not have a claim of entitlement. The Sixth Circuit, however, found that the City had approved the site plan and that Buckeye's "property interest was securely vested upon the City's" approval. *Id.* at 643.

As we explain below, the Sixth Circuit incorrectly applied the "entitlement approach" in this matter. While NAHB

agrees that there are sufficient facts that warrant further development of Buckeye's due process claim, we disagree that the government's site plan approval somehow created the right at issue. Buckeye's constitutionally protected right to use its property derives from its ownership of the property.

B. *Roth* and *Perry* Were Meant to Expand Property Rights, Not Contract Them.

The *Roth* Court explained that it is "clear that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." This statement establishes a baseline of those things that comprise a property interest, namely the ownership of real estate, chattels or money. Furthermore, the statement makes clear that there are property rights that exist beyond the baseline—such as "the security of interests that a person has already acquired in specific benefits." *Roth*, 408 U.S. at 576. The Court further explained that welfare benefits and continued public employment are examples of these expanded property rights. Thus, the *Roth* Court clarified that the law recognizes property rights beyond the ownership of real property, chattels or money and that the baseline interest is always sufficient to trigger due process protection.

Similarly, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 999 (1984) Monsanto claimed that the government unlawfully took trade secrets in violation of the Fifth Amendment. As with the due process analysis, the Court begins a "takings" analysis by determining whether the complainant has a property interest. *Id.* at 1000. The Court began its analysis by analogizing trade secrets to real property and explaining that they have "many of the

same characteristics . . .." *Id.* at 1003. Furthermore, the Court explained that the "perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes products of an individual's 'labour and invention.'" *Id.* at 1003 (citations omitted). Thus, in holding that Monsanto's trade secrets were "property," the Court again recognized that "land and tangible goods" are the baseline of those things that comprise property.

In addition to an interest in the land, Courts that apply the "entitlement approach" to land regulation cases require landowners to prove entitlement to a permit or approval. This extra requirement, which focuses on the state imposed restriction, leads to less property interests being recognized, not more. This is contrary to the *Roth* Court's desire to expand the set of protectable property interests. It also follows that because fewer courts recognize a protectable property interest, fewer courts will move to the next step and analyze whether the government arbitrarily and capriciously deprived the owner of his rights.

Even courts that use the "entitlement approach" have recognized this problem. For example, in the leading case[7] of *RRI Realty Corp. v. Village of South Hampton*, 870 F.2d 911 (2nd Cir. 1989), the property owner sought a building permit to expand a home. After the Village denied the landowner a permit, the landowner brought suit claiming that the Village violated its due process rights by arbitrarily and capriciously denying the permit. Using the "entitlement approach," the Second Circuit held that the plaintiff did not have a property interest because of the discretion that the Village review board had to issue the

[7] Mandelker, *supra*, at 79.

permit. Thus, the court never analyzed whether the Village acted arbitrarily.

Nevertheless, the *RRI C*ourt also questioned why courts have applied the entitlement approach to land use cases. It recognized that focusing on the discretion of the regulator "permits the threshold rejection of some federal due process claims, without awaiting exploration of whether the regulator acted so arbitrarily as to offend substantive due process . . .." *Id.* at 918.

C. The Lower Courts Fail to Look Beyond State Law When Determining One's Property Rights.

In many of the "entitlement approach" cases, the Circuit Courts restate this Court's declaration in *Roth*, that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source **such as** state law—rules or understandings . . .." *Roth*, 408 U.S. 577 (emphasis added); *Accord Perry*, 408 U.S. at 601 (explaining that property interests are secured by "'existing rules or understandings.'") (citing *Roth*). However, state courts often abbreviate the statement, asserting that state law defines property rights. *See e.g. Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210-13 (10th Cir. 2000) (focusing only on "state and local law"); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124 (2nd Cir. 1998) (looking only to New York zoning law to determine whether plaintiffs had a legitimate claim of entitlement); *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (providing that landowner's property rights were "created and defined by the Baltimore city

charter and the Planning Commission's subdivision regulations promulgated thereunder.").

By focusing only on state law, these courts ignore the words "such as" and they fail to analyze whether there are other more basic understandings that define property rights, such as those presented in Part I. *Supra* pp. 5-11.

III. In a Due Process Challenge, a Minority of Circuits Correctly Focus on The Claimant's Relationship to The Property In Question.

The Third and Seventh Circuits have correctly focused on the claimant's relationship to the property to determine whether a property interest exists in a due process case. For example, in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3rd Cir. 1995), a landowner brought a substantive due process action claiming that a township's zoning board violated his rights when it denied him a variance. The Third Circuit explained that to have an actionable substantive due process claim, the claimant must possess a property interest worthy of constitutional protection. *Id.* at 598. Ownership, according to the court, "is a property interest worthy of substantive due process protection." *Id.* at 600. Furthermore, the Third Circuit provided that it did not believe that this Court's jurisprudence mandated the use of the entitlement approach. *Id.* at 600 n.9.

The Seventh Circuit has also documented a similar approach. In *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989), property owners claimed that two city employees violated their due process rights with respect to a tavern license and certificate of occupancy. The Seventh Circuit explained that when a landowner challenges a zoning

regulation on due process grounds, "the property interest in such a case is apparent—it is the ownership interest in the land itself . . .." *Id.* at 556.

Thus, though these Circuits acknowledge that a state may regulate the use of property, they correctly focus their due process analysis on the claimant's relationship to the property in question, not on the restrictions imposed by the state. And these courts have correctly concluded that ownership is a property interest that the Constitution protects.

CONCLUSION

The U.S. Constitution does not allow a state to deprive a citizen of his property without due process of law. Every citizen of the United States has the right to own property. When one owns property, the owner has an inherent right to use the property. Thus, in due process cases where the claimant owns real property, courts need not analyze the owner's degree of entitlement to use the property. In these cases, courts should recognize that the owner has a property interest in the use of the property and determine whether the state arbitrarily and capriciously deprived the owner of said use.

For all of the foregoing reasons, this Court should uphold the Sixth Circuit's conclusion, but clarify that Buckeye's protected property interest arises from its right to use the land at issue, not because the municipality approved a land use plan.

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Respectfully submitted,

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